NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD ACOSTA, a single man, Plaintiff/Appellee, v. PHOENIX INDEMNITY INSURANCE COMPANY, Defendant/Appellant.	2 CA-CV 2009-0174 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20050642

Honorable Paul Tang, Judge

AFFIRMED

Law Offices of John L. Tully, P.C.
By John L. Tully — Tucson

and

Humphrey & Petersen, P.C.
By Andrew Petersen — Tucson
Attorneys for Plaintiff/Appellee

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By Robert K. Lewis and Christopher A. Treadway — Phoenix
Attorneys for Defendant/Appellant

H O W A R D, Chief Judge.

¶1 In this third-party-insurance bad faith case, appellant Phoenix Indemnity Insurance Company (Phoenix Indemnity) appeals from a judgment entered on a jury verdict in favor of appellee Richard Acosta. Phoenix Indemnity argues that the trial court erred by providing certain jury instructions and excluding another and also by preventing it from asserting the unclean hands defense. Because the trial court did not err, we affirm the judgment.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury verdict. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). The facts underlying this appeal are set forth in an opinion issued by this court in which we reversed the trial court's initial grant of summary judgment in favor of Phoenix Indemnity and remanded the case for further proceedings. *Acosta v. Phoenix Indem. Ins. Co.*, 214 Ariz. 380, 153 P.3d 401 (App. 2007) ("*Acosta I*"). Upon remand, a jury returned a verdict in favor of Acosta. The trial court entered a judgment awarding him $400,000 in damages. This appeal followed.

Jury Instructions

¶3 Phoenix Indemnity argues that the trial court erred with respect to three jury instructions: two the court gave and one it refused. "We review a court's jury instructions for an abuse of discretion." *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, ¶ 50, 217 P.3d 1220, 1238 (App. 2009). But we review

de novo whether a particular instruction correctly states the law. *Id.* "In assessing the necessity of jury instructions[,] we must view the evidence in the light most favorable to the instruction's proponent." *Starr v. Campos*, 134 Ariz. 254, 255, 655 P.2d 794, 795 (App. 1982).

¶4 "The court must give a proposed jury instruction 'if: (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue, and the gist of the instruction is not given in any other instructions.'" *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, ¶ 22, 207 P.3d 654, 662 (App. 2008), *quoting DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985). And "jury instructions are [reviewed] as a whole with an eye toward determining whether the jury was given the proper rules of law to apply in arriving at its decision." *Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 126, 927 P.2d 781, 786 (App. 1996). A jury verdict will not be disturbed based on improper instructions "unless there is substantial doubt as to whether the jury was properly guided in its deliberations." *Id.* We review each instruction in turn.

Miel Instruction

¶5 Citing *Miel v. State Farm Mutual Automobile Insurance Co.*, 185 Ariz. 104, 912 P.2d 1333 (App. 1995), Phoenix Indemnity first argues the trial court should have given its requested instruction that mistake does not amount to bad faith. In *Miel*, after being injured in an accident caused by another party, the plaintiff sent a letter to the at-fault party's insurer with a contingent, time-limited offer to settle her claims for the policy limits. *Id.* at 106-07, 912 P.2d at 1335-36. After confirming receipt of the letter,

the claims representative apparently misplaced the file for a couple of weeks and thus failed to respond to the offer by the plaintiff's deadline. *Id.* At the ensuing bad faith trial, the court instructed the jury on bad faith using the "Recommended Arizona Jury Instructions 2d (Civil) Bad Faith Instruction No. 8" ("RAJI 8"). *Id.* at 109, 912 P.2d at 1338. But the jury was not instructed that the insurance company could not be liable for bad faith due to mistake. *Id.* at 110, 912 P.2d at 1339. On the facts of that case, including a statement by the plaintiff's counsel in closing argument that mistake would not excuse bad faith, we concluded that the absence of an instruction on mistake was reversible error. *See id.*

¶6 Phoenix Indemnity contends its counsel, Kathleen Rogers, was mistaken in her belief that Acosta's June 20 settlement letter concerned only Lara, not Carranza,[1] and that her mistaken belief should not support a finding of bad faith. But Phoenix Indemnity had determined that its policy did not cover Carranza and thus had denied coverage on April 5, well before the June settlement offer. When Acosta filed suit on April 20, the company again evaluated the claim and decided not to defend Carranza or to settle on his behalf. And the alleged mistake did not relieve Phoenix Indemnity of its obligation to attempt to settle the case on behalf of Carranza. Phoenix Indemnity did not reverse its position and admit coverage until months later, after it had met with Carranza in August and obtained an independent legal opinion about coverage and implied permissive use. Furthermore, nothing in the record supports Phoenix Indemnity's intimation that it would

[1]Carranza was the driver and party at fault in the accident underlying this appeal, and he assigned his bad faith claim against Phoenix Indemnity to Acosta. Lara is the owner of the car and the insurance policy.

have handled the claim differently had it known the settlement offer included Carranza. In the absence of such evidence, any mistake by counsel was irrelevant. The evidence, therefore, did not support giving a *Miel* instruction.

¶7 Moreover, even if the refusal to give a *Miel* instruction had been error, we find no prejudice because, when viewed as a whole, the jury instructions here adequately informed the jury of the "proper rules of law to apply." *See Thompson*, 187 Ariz. at 126, 927 P.2d at 786. The bad faith instruction, based on RAJI 8, correctly and clearly stated the requirement that an insurer give the same consideration to its insured's interests as to its own when considering settlement and that the test was whether a prudent insurer without policy limits would have accepted the settlement offer. *See* State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)* 4th, Bad Faith 8 (2005). And in *Miel*, we observed that this instruction was "geared more to a case in which the issue is the insurer's considered decision not to pay a claim," as was in fact the case here. 185 Ariz. at 110, 912 P.2d at 1339.

¶8 Additionally, during closing argument, Phoenix Indemnity's counsel actually stated that Rogers's mistake with respect to the settlement offer would not be sufficient for a finding of bad faith. Moreover, unlike the situation in *Miel*, Acosta's counsel during closing arguments did not mention mistake—or the events of June 2001 at all—as a basis for finding bad faith. Thus, any ambiguity in the jury instructions was clarified in closing arguments. *Cf. State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) ("Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions."); *see also Smith v. Chesapeake & Ohio Ry.*,

778 F.2d 384, 387-88 (7th Cir. 1985) (in assessing jury instructions, closing arguments considered in determining if jury "adequately informed of the applicable law"). Here, the instructions as a whole accurately informed the jury of the law, so we cannot conclude that there is "substantial doubt as to whether the jury was properly guided in its deliberations" absent the requested instruction. *See Thompson*, 187 Ariz. at 126, 927 P.2d at 786. Therefore, "in light of the facts presented at trial and taken in context with the [other] instructions [given]" and the closing arguments of counsel, the lack of an instruction on mistake is not reversible error. *See id.* at 127, 927 P.2d at 787.

Civil Service Instruction

¶9 Phoenix Indemnity next argues the trial court erred in presenting an instruction to the jury based on the language of *State Farm Automobile Insurance Co. v. Civil Service Employees Insurance Co.*, 19 Ariz. App. 594, 509 P.2d 725 (1973). The court gave the following instruction: "When an insurer refuses to consider a policy limit settlement because the company does not believe that the policy provides coverage for the claim, it acts at its peril, even if the company has an honest, though erroneous, belief that the policy does not provide coverage." Phoenix Indemnity argues that the instruction was not an accurate statement of the law and that the language "at its peril" represented the court's "comment on the evidence."

¶10 In *Acosta I*, we approved the very language later used in the jury instruction as "a correct statement of the law." 214 Ariz. 380, ¶ 19, 153 P.3d at 405. Thus, this issue has already been litigated, and our conclusion in *Acosta I* represents the law of the case. *See Flores v. Cooper Tire and Rubber Co.*, 218 Ariz. 52, ¶ 23, 178 P.3d 1176, 1181

(App. 2008). And, to violate the prohibition against commenting on the evidence, "the court must express an opinion as to what the evidence shows or what it does not show." *Jones v. Munn*, 140 Ariz. 216, 221, 681 P.2d 368, 373 (1984). The challenged instruction merely stated the law as decided in *Acosta I* and did not express an opinion about what the evidence proved with respect to any disputed fact. Therefore, the jury was properly guided by this instruction.

Fulton Instruction

¶11 Phoenix Indemnity further argues the trial court erred in giving an instruction based on *Fulton v. Woodford*, 26 Ariz. App. 17, 545 P.2d 979 (1976). Phoenix Indemnity first contends that the instruction was error because *Fulton* is no longer good law and, in the alternative, because the instruction ignores causation. However, it did not object on these grounds below, and an objection on one ground does not preserve another for appeal.[2] *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 6, 119 P.3d 467, 470-71 (App. 2005); *Sulpher Springs Valley Elec. Co-op., Inc. v. Verdugo*, 14 Ariz. App. 141, 146, 481 P.2d 511, 516 (1971). Phoenix Indemnity nevertheless asserts that it preserved its primary argument by raising it in its brief on the first appeal. But the purpose of requiring a party to make a specific objection in the trial court is to give the court an opportunity to rule on the matter before an appellant claims it is error in this court. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994).

[2]At oral argument, Phoenix Indemnity argued that it had preserved this issue in its pretrial objection to Acosta's proposed jury instructions. However, Phoenix Indemnity did not state anywhere in that document that *Fulton* is no longer good law—it does not mention *Fulton* at all—nor did it raise the issue of causation with respect to *Fulton* and the duty to initiate settlement.

Consequently, "arguments not made at the trial court cannot be asserted on appeal." *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991). Therefore, Phoenix Indemnity has waived its objection on these grounds.

¶12 Phoenix Indemnity also asserts the trial court erred in providing this instruction because, given that there was a coverage dispute in this case, *Fulton* is distinguishable. In *Fulton*, we held that a "conflict of interest [between insurer and insured] would give rise to a duty on behalf of the insurer to give equal consideration to the interest of its insured where there is a high potential of claimant recovery and a high probability that such a recovery will exceed policy limits." 26 Ariz. App. at 22, 545 P.2d at 984.

¶13 Phoenix Indemnity argues that, "[w]ithout coverage, a conflict of interest providing for the duty to give equal consideration cannot arise . . . ." But in *Fulton* we identified a high potential of claimant recovery and a high probability that such a recovery would exceed policy limits as the factors creating the conflict of interest. *See id.* Phoenix Indemnity appears to acknowledge those factors are present here. And it has not supplied any authority refusing to apply *Fulton* in the face of a coverage dispute.

¶14 Furthermore, "[t]he mere fact that an insurer has erroneously concluded that there is no coverage and therefore in good faith refuses to defend, cannot excuse subsequent breaches by the insurer of other provisions of the contract, including the implied obligations pertaining to settlement." *Civil Service*, 19 Ariz. App. at 602, 509 P.2d at 733. And the duty of equal consideration, which arises from the implied covenant of good faith and fair dealing, is such an obligation. *See Acosta I*, 214 Ariz. 380, ¶ 12,

153 P.3d at 404. Therefore, because there was evidence to support the instruction, because it is a correct statement of the law, and because it pertains to an important issue that was not addressed in other instructions, we find no abuse of the trial court's discretion in instructing the jury based on *Fulton*. *See Strawberry Water Co.*, 220 Ariz. 401, ¶ 22, 207 P.3d at 662.

Unclean Hands Defense

¶15 Phoenix Indemnity finally argues that the trial court erred in precluding it from asserting the "unclean hands" defense by having granted summary judgment to Acosta on the issue. We review a grant of summary judgment de novo. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006). Summary judgment is required where there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1).

¶16 Phoenix Indemnity contends it should have been able to assert the "unclean hands" defense, stating that Acosta and Carranza had been drinking and "were driving to get some crack cocaine" at the time of the accident. "The doctrine of 'unclean hands' is an equitable defense to a claim seeking equitable relief." *Tripati v. State*, 199 Ariz. 222, ¶ 8, 16 P.3d 783, 786 (App. 2000) (emphasis omitted). And "[i]t is a cardinal rule of equity that [one] who comes into a court of equity seeking equitable relief must come with clean hands." *MacRae v. MacRae*, 57 Ariz. 157, 161, 112 P.2d 213, 215 (1941).

¶17 But Acosta is not seeking equitable relief, so the defense is not available in this action. Moreover, the actions by Carranza on which Phoenix Indemnity relies were neither relevant to, nor a basis for, the determination and denial of coverage.

Furthermore, the failure of Acosta's attorney to convey information to Phoenix Indemnity that could have "potentially trigger[ed] coverage" does not constitute unclean hands. Because the equitable defense of unclean hands is not available in this context, the court did not err in granting summary judgment to Acosta and precluding Phoenix Indemnity from asserting it.

Conclusion

¶18 In light of the foregoing, we affirm the trial court's judgment on the verdict.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge